Last month, the World Health Organization (WHO) declared the novel coronavirus (2019-nCoV) a Public Health Emergency of International Concern (PHEIC). In doing so, the WHO added the virus to the growing list of PHEICs including such diseases as Severe Acute Respiratory Syndrome (SARS), H1N1 (Swine Flu), Ebola, Zika virus, and Smallpox. This declaration was made in the wake of global travel restrictions and citywide lockdowns in certain areas of China because of the virus' contagious, and potentially deadly, nature.

As China is a major source of the manufactured components, there have been concerns across the power, energy and infrastructure sectors that Chinese suppliers and their downstream customers may face difficulties satisfying supply and service obligations—particularly those reliant upon component parts coming from the City of Wuhan, where the virus is believed to have originated and where the Chinese government has focused its lockdown protocols.

The question of whether the novel coronavirus constitutes a "force majeure event" that can trigger a force majeure clause in business contracts is one of critical import to business reliant upon products or components coming out of China. In many cases, end users and purchasers located elsewhere around the world may not even be aware that the product inputs which their projects or production processes rely on might be impacted by events in China.

**Start with the Clause**

A force majeure clause is a common inclusion to contracts for protecting parties from
impairment caused by extraordinary or extreme events. These extraordinary events are often referred to as "acts of God". When a force majeure clause has been included in a contract and force majeure events actually do occur, the expectation is that the party or parties facing impairment as a result of the proscribed force majeure event—a hurricane, war, flooding, political unrest, epidemic, etc.—will be relieved of all or some portion of its delivery obligations under the relevant contract and from all or some portion of liability for damages arising from delay or default occurring in the performance of its contractual obligations.

In drafting these provisions, companies will often use language that defines what will or will not constitute a force majeure event, often by listing specific examples which qualify as such—hurricanes, war, volcanic eruptions, strikes, lockouts, etc. Occasionally, in the rush to get the deal done, not a great deal of thought is given to the breadth or inclusions expressed in the clause and a "boilerplate" is used.

If there is no force majeure clause, courts will still consider defences by the impaired party based on foreseeability of the impairing event. Whether there is a force majeure clause or not, the burden of proof rests on the party seeking to rely upon the force majeure provision. In any case, the key starting point is with the force majeure clause itself. What does it say? Do the events which one party alleges to have occurred actually qualify under the terms of the clause? If so, did those qualifying events actually lead to the delay or the breach in question?

**Force Majeure Case Law in Canada**

For the past half-century, the leading case on force majeure in Canada has been *Atlantic Paper Stock Ltd. v St. Anne Nackawic Pulp & Paper Co.* This was a 1975 Supreme Court decision concerning a minimum annual supply of paper pulp over a 10-year period, which allegedly became subject to extraordinary events including acts of God and substantial decline in the market for such paper pulp. In this decision, Justice Dickson established that, "An act of God clause or force majeure clause … generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill" (emphasis added). Since then, no Canadian Supreme Court cases have revisited the matter in depth. However, despite the lack of Supreme Court precedents, there have been various lower-court cases affirming *Atlantic Paper* and exploring the interpretation of force majeure clauses.

In *World Land Ltd. v Daon Development Corp.*, the court accepted the use of basket clauses to define the scope of force majeure applicability. In this case, a land development company was accused of failing to commence construction on the land by a specific date. In the agreement,
the force majeure clause included in its definition of force majeure events, the very broad and inclusive language, "...or any other causes...beyond the control of the vendors or the purchasers". The company had relied on this language and announced that the development would be delayed on the grounds of not having received a development permit, which it claimed was beyond its control. The court accepted the applicability of the basket clause. However, to the detriment of the land development company, it chose to interpret the language plainly and held that it had been within the company's control to obtain the permit on time. In other words, the party alleging that force majeure events occurred was not entitled to sit idle.

Subsequently, Atcor Ltd. v Continental Energy Marketing Ltd. seemed to have revised the criteria for what constitutes a force majeure event. In this decision, a gas supplier successfully relied on force majeure when it failed to deliver gas because of various technical pipeline issues suffered by a third party pipeline owner. Here, the Alberta Court of Appeal rejected the idea that a force majeure event had to make performance impossible. Instead, "a real and substantial problem" that makes contractual performance commercially unfeasible was held to be the standard—i.e. a significantly lower threshold than the impossibility of performance standard posited in Atlantic Paper, cited above. Despite the apparent departure in Atcor, the impossibility standard set in Atlantic Paper has continued to be followed in recent cases. Thus, from a practical viewpoint, unless you have expressly contracted otherwise, 'impossibility of performance' should be viewed as the basic standard when reviewing force majeure circumstances.

As if to emphasize this point, in the 2011 British Columbia Supreme Court decision Domtar Inc. v Univar Canada Ltd., there was a focus on language of the force majeure provision. The facts were that a supplier could not source and supply caustic soda on commercially acceptable terms and, therefore, alleged that an event of force majeure had occurred and that it should be exempted from its contractual supply obligations. The force majeure event, in this case, was not being able to purchase raw materials at a commercially acceptable price because of an unprecedented rise in price of caustic soda. The argument was ultimately unsuccessful. The B.C. court found that the force majeure clause in the relevant contract did not include or contemplate economic or market conditions, and agreed with earlier findings from the English courts that, "the fact that a contract has become expensive to perform, even dramatically more expensive, is not a ground to relieve a party on the grounds of force majeure."

Domtar Inc. suggests that "economic" force majeure would be extremely difficult, if not impossible, to justify. It also emphasizes the point which we made above—start by reading the force majeure clause in your contract.

**Considering the Novel Coronavirus**
It is not uncommon for force majeure clauses to include specific references to terms such as "plague" or "epidemic" when describing force majeure events. In light of global health emergencies that have surfaced in the last few decades, we have found that these types of clauses have included increasingly specific event references such as "public health emergencies" and "communicable disease outbreaks". However, whether these specific wording inclusions will be of use to the party alleging that a force majeure event which can be relied upon as relieving it from its contractual obligations has occurred remains uncertain.

The Canadian case law surrounding force majeure provisions based on global health concerns is limited. For example, most mentions of the 2003 SARS outbreak or the 2015 Ebola pandemic pertain to cases of domestic occupational health and safety and refugee protection. Reported cases that refer to these specific health crises as triggers of force majeure are few. There is one 2005 decision issued by the Canadian Radio-television and Telecommunications Commission (CRTC) concerning rate adjustment plans in the Telecom industry that linked SARS to a force majeure event. In the decision, Bell Canada, TELUS, and several other telecom companies submitted that the 2003 SARS outbreak in Toronto fell within the scope of the following force majeure clause:

"No penalty shall apply in a month where failure to meet the standard is caused, in that month, by fire, strikes, default or failure of other carrier, floods, epidemics, war, civil commotions, acts of God, acts of public authorities or other events beyond the reasonable control of the Company which cannot reasonably be foreseen or provided against."

In this case, Canadian telecom carriers sought to rely upon the force majeure wording above, arguing that factual circumstances, including the necessity to quarantine of a number of Bell Canada employees, and the specific mention of "epidemics" in the force majeure clause, lessened their respective quality of service obligations. (In many force majeure clauses, epidemics are not specifically included in the clause and left to be read-in under the sweeping category "other events beyond the reasonable control of the Company".) In the end, the CRTC held that the approach to be adopted in order to determine whether or not SARS-related events were sufficient to trigger force majeure clause protections was a case-by-case one.

**Take Action**

Parties in default or considering potentially going in to default under the provisions of a supply contract on the basis of the novel coronavirus should consider that force majeure provisions are actually rather difficult to rely upon.

First, it must be shown that a force majeure event, qualifying as such under the terms of the
relevant contract, has occurred. As noted above many force majeure provisions do not include 'disease' or 'pandemic' in the list of enumerated grounds. Whether the novel coronavirus currently qualifies as such is a question of fact which parties might dispute.

Second, it must be demonstrated that the alleged force majeure event actually caused the non-performance or delay in question. Is the product or resource actually something that is currently only manufactured in Wuhan or Hubei Province or are there suitable competing suppliers or replacement goods from other areas of the world? What duties or obligations to remedy exist for the party seeking to rely upon the clause. If supply out of Wuhan is blocked, does the supplier have an obligation to seek supply elsewhere? Should the supplier have reasonably foreseen the possibility of supply being blocked from a single world location and set up alternative arrangements in advance? Is there a limit to the cost of alternative supply that the supplier is obligated to pay? Remember that materially higher costs might not be sufficient defence to non-performance.

Finally, there is the question of the extent of relief from contractual obligations. What failure or delay is permitted to the underperforming supplier before the contract can be cancelled or damages begin to accrue? This latter question may turn directly upon the wording of relief provisions built in to the relevant force majeure clause itself. Many force majeure clauses provide for a limited period of delay before the supplier is obligated to supply or pay liquidated damages.

The governing law of the contract in question may have a significant bearing on whether force majeure is available to the non-performing party and how the clause in question (if any) is read and interpreted. There are significant differences between Canadian, English, American and Chinese case law on the topic. (We have discussed only Canadian law in this article.)

When presented with a force majeure claim by a supplier, begin dealing with the matter promptly. Many suppliers will issue force majeure notifications in anticipation of a potential future supply failure. While this may be helpful from a commercial perspective, it is often advisable to respond promptly to these notifications and seek further clarity on whether a force majeure event has actually occurred. Depending on the situation, it may be advisable to challenge the validity of the notification.

A Brief Word on Future Drafting

When drafting force majeure provisions, it is worth bearing in mind lessons learned from the novel coronavirus, from the SARS outbreak in 2003, and from the Fukushima nuclear disaster in 2011. We generally consider specific and concise language to:
(a) expressly include/exclude "local disease outbreaks" or events that are local in nature or cause only commercial impracticality;

(b) address whether "impossibility of contractual performance" is the actual threshold required to trigger force majeure protections or whether a lower standard taking into account commercial practicalities should apply;

(c) ensure that the performance of obligations which apply during and after a force majeure event, including remedy and alternative supply provisions and maximum delay periods, are sufficiently detailed; and

(d) ensure that the governing law of the contract(s) in question is crystal clear.

We also recommend drafting detailed notice and notification provisions for anticipated force majeure events that will make sure that notice goes to the right individual(s) within your organization on a timely basis, giving them sufficient time to prepare a detailed response and think through possible business solutions to any impending supply interruptions.

Finally, from a commercial perspective, we recommend taking practical steps to ensure that all critical suppliers have redundant alternative supply options or emergency protocols in the event of future emergencies, including public health emergencies.
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